United Nations CAC/COSP/IRG/I/2/1/Add.34

Conference of the States Parties to the United Nations Convention against Corruption

Distr.: General
18 February 2016

Original: English

Implementation Review Group
Seventh session
Vienna, 20-24 June 2016
Item 2 of the provisional agenda*
Review of implementation of the United Nations Convention against Corruption

Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Mozambique

1. Introduction: Overview of the legal and institutional framework of Mozambique in the context of implementation of the United Nations Convention against Corruption

Mozambique signed the Convention on 25 May 2004 and ratified it on 9 April 2008.

According to the Constitution of Mozambique, the Convention has become an integral part of domestic law with the status of ordinary law since it was ratified by the parliament (art. 18). Mozambique follows the tradition of Romano-Germanic civil law. The legal system is based on Portuguese civil law and on customary law.

The most prominent institutions in fighting corruption are the Ministry of Justice, the Central Anti-Corruption Office in the corresponding office of the Attorney General's Office at the national level, the Financial Intelligence Unit and the Central Public Ethics Commission.

Since the entry into force of the new Constitution (2004), Mozambique has introduced legal norms in that area, among others: the Law on Probity (16/2012), the General Statute governing public officials and agents of State (14/2009), the Law on Prosecution (14/2012), and the Witness Protection Act (15/2012). The Criminal Code was amended by Law No. 35/2014. The Criminal Procedure Code is currently in the process of amendment.

A national anti-corruption strategy was implemented in 2007, following the creation of the Financial Intelligence Unit.

Under the terms of article 522 of the Criminal Code, a public official is understood as a person who holds a mandate, charge, position or function in a public entity, by virtue of election, nomination, hiring, or any other form of investiture or designation, even if temporarily or without remuneration. That definition was harmonized through article 523 of the Criminal Code and the Code of Conduct, which seeks to assimilate any other existing terminology that may be used to define a public official in domestic law.

2. Chapter III: Criminalization and law enforcement

2.1. Observations on the implementation of the articles under review

Bribery and trading in influence (arts. 15, 16, 18 and 21)

Active bribery of public officials is regulated in article 501 of the Criminal Code.

Passive bribery of public officials is defined as an offence in the Criminal Code (arts. 502 and 503), and articles 40 and 41 of the Law on Probity, which defines acts of public improbity. Benefits for third parties and the concept of "offering" are not explicitly covered by those statutory definitions.

The legal system does not cover the figure of transnational bribery. Domestic law does not contain a definition of a foreign public official or an official of an international public organization.

Mozambique has included the offences of active and passive trading in influence in article 508 of the Criminal Code. The Probity Law (art. 25) contains prohibitions on performing public functions, but they do not conform to the Convention.

Mozambican law has not specifically addressed bribery in the private sector. Bearing in mind that the matter is not restricted to public officials, articles 501 to 503 of the Criminal Code may apply.

Money-laundering, concealment (arts. 23 and 24)

The laundering of the proceeds of crime is covered in the Law against Money-laundering (No. 7/2002) and its amendment, which regulate matters of criminalization and prevention in articles 4 and 7. The crimes of corruption that are covered by statute law can be considered predicate offences to money-laundering.

The Law contains a comprehensive list of entities which have the obligation to report suspicious transactions. However, during the country visit it was emphasized that the number of reports received by the Financial Intelligence Unit was extremely small.

Concealment is not specifically criminalized. Article 24 of the Criminal Code comes closest to a definition of that conduct; however, it merely contains a list of persons who may be considered concealers. Nevertheless, the legal figure does appear in the Law against Money-laundering. There is no generic regulation in the Criminal Code. The element of continuing retention is not included.

Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)

The Criminal Code provides for the crimes of embezzlement, misappropriation or other diversion of property by a public official in articles 514, 515 and 516. Such conduct is divided into various forms of misappropriation or deviation, but is limited to public officials, excluding property and third-party beneficiaries.

Abuse of functions is established in article 80 of the Probity Law and article 507 of the Criminal Code. Article 519 sanctions the illegal drawing of salaries.

Illicit enrichment is regulated in several provisions: the Probity Law (arts. 33, 40 and 41), which distinguishes between illicit enrichment and undue enrichment; article 511 of the Criminal Code on illicit enrichment; and article 512 of the Criminal Code, which sanctions it with confiscation of assets exceeding the total value of the illegal assets. The concept extends beyond public officials to include any person who fails to justify a significant increase in assets. Public officials are required to make a declaration of assets by Law No. 4/1990. However, that provision does not apply to all public officials, only to a limited number. That law was complemented by Law No. 16/2012, which increased the number of public officials obliged to fill out a declaration (including magistrates, judges and prosecutors).

Mozambican law has not specifically criminalized embezzlement or misappropriation in the private sector.

Obstruction of justice (art. 25)

There is no specific legislation that sanctions obstruction of justice and protects officers of the justice system or of law enforcement services.

Isolated provisions can be found in the laws on money-laundering (art. 31, amended by art. 69 of the amended Law against Money-laundering). However, both apply only to a restricted number of offences and do not apply to the predicate offences.

Liability of legal persons (art. 26)

Mozambican law recognizes the principle of criminal liability of legal persons. The Criminal Code regulates criminal liability in articles 27 to 30. The Law on Credit Institutions 15/1999 (art. 95) contains similar provisions.

The liability of legal persons does not exclude the individual liability of members of the respective organizations in handling management expenses or those who legally or voluntarily act on their behalf.

No other sanctions applicable to legal entities were cited, for which reason it has not been possible to analyse their effectiveness. Article 70 of the Criminal Code expressly provides for dissolution of the collective entity as a sanction.

Mozambique has not established the administrative liability of legal persons or the applicable sanctions.

Participation and attempt (art. 27)

The Criminal Code regulates participation (arts. 20-26 and 129) and attempt (arts. 11, 14-16 and 131). Preparation with intent to commit a corruption offence is penalized (arts. 15 and 17).

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

The general provisions on sanctions can be found in the Criminal Code (arts. 60-104). The Public Prosecutor does not have discretionary legal powers to investigate and prosecute corruption offences (art. 40-H of Law 14/2012 on the Office of Public Prosecutions).

As regards jurisdictional prerogatives, members of parliament, judges, and prosecutors are granted immunity (Law 7/2009 on the Judicial Branch and Law 22/2007 on the Statute of the Attorney General's Office). The procedure to lift immunity depends on the person. According to information provided by the Mozambican authorities, the President's immunity can be lifted by parliament, while the immunity of members of parliament can be lifted by the plenary or by the Standing Committee. The immunity of judges, magistrates and prosecutors can be lifted by their management and discipline organ.

Parole is regulated in articles 146 to 148 of the Criminal Code. The General Statute on Public Officials and Agents of the State Law 14/2009 provides for sanctions and prohibition applicable to public officials charged with a corruption offence.

Protection of witnesses and reporting persons (arts. 32 and 33)

Mozambique has enacted the Law on Protection of Victims and Witnesses No. 15/2012, which contains the protection programme and measures for relocation and evidentiary standards, which allow witnesses to testify without compromising their safety.

The Central Bureau for the Protection of Victims, an agency of the Ministry of Justice formed by members of the administration of justice and law enforcement, coordinates the programme for the protection of witnesses, experts and victims, and consequently is responsible for executing special protective measures. The text provided does not contain specific guidelines regarding the time during which a victim may exercise his or her rights or the time during which protection can be provided.

Physical, mental and property protection for reporting persons is provided for under the same legal framework of Law 15/2012 and Law 6/2004. In that area, there are no statistics available, as Law 15/2012 was enacted recently.

Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)

The Criminal Procedure Code contains norms applicable to seizure and confiscation (arts. 215-241). Those provisions do not include seizure or confiscation of instrumentalities "intended to be used" in committing offences.

The Law against Money-laundering contains specific provisions on seizure, not only of the proceeds and instrumentalities of crime, but of property that has been mixed or transformed.

The courts may confiscate money or assets deposited in financial institutions, if there are grounds to believe that they are instrumentalities or proceeds of crime (art. 234 of the Criminal Procedure Code), but that possibility excludes the proceeds or instrumentalities of crime that are not in financial institutions.

The Criminal Procedure Code does not contain provisions on the organ responsible for the administration of seized or confiscated assets.

Protection of bona fide third parties is covered in article 38 of the draft Law against Money-laundering.

Bank secrecy may not be invoked against a judicial authority in an ongoing proceeding (art. 18 of the Law against Money-laundering and art. 63 of its amendment).

Statute of limitations; criminal record (arts. 29 and 41)

The statutes of limitations appear to be satisfactory and the possibilities for interruption have been regulated (arts. 151-153 of the Criminal Code).

The statute of limitations for serious crimes is 15 years, for crimes subject to correctional penalties or provisional measures it is 5 years, sanctions for violations, 3 years and for electoral crimes after 1 year. It is not clear whether the statute of limitations will be suspended during the proceedings to determine the immunity of a public official.

Mozambique has not legislated to take into account previous offences committed in another jurisdiction when adjudicating an offence.

Jurisdiction (art. 42)

Mozambique has established its jurisdiction in relation to most of the cases mentioned in article 42 of the Convention, in particular in relation to crimes committed on its territory, on board ships or aircraft (art. 56 of the Criminal Code), although it has not clearly established its jurisdiction over acts of participation, preparation, attempt and other actions with intent to commit a money-laundering offence which take place entirely abroad, or over crimes committed against one of its nationals or the State party. Mozambique mentioned that it would have to adopt measures to establish its jurisdiction in relation to corruption offences when the alleged offender is on its territory and the State party does not extradite him, including cases in which denial of extradition is based on the person's nationality.

Mozambique has not provided for regulations or practical cases of consultation in accordance with article 42, paragraph 5, of the Convention.

Consequences of acts of corruption; compensation for damage (arts. 34 and 35)

Mozambique has legislation on the consequences of acts of corruption, establishing that acts or contracts signed in violation of norms on conflicts of interest or any rule of conduct may be voided at the request of the interested parties, including the validity of contracts and administrative acts (arts. 85-88 of the Law on Probity).

The general principle of nullity of a contract which contradicts a legal prohibition also applies to contracts concluded as the result of acts of corruption.

Mozambican legislation takes account of persons who have suffered damages by considering full compensation and restitution for damages suffered as the result of criminal offences, which are the result of acts of corruption (art. 58 of the Constitution, art. 106 of the Criminal Code, arts. 23-26 of the Criminal Procedure Code and arts. 82 and 86 of the Law on Probity).

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

There is an entity at the national level responsible for the prevention and criminalization of corruption. The Central Anti-Corruption Office was established by Decree 22/2005 of 22 June. The Law on the Office of Public Prosecutions No. 14/2012 increased its functions and powers. That amendment determined that the Office would now perform its duties under the supervision of the Attorney General's Office.

Other organs specialized in criminalization are the Central Public Ethics Commission, which coordinates the actions of the public ethics commissions and establishes norms, procedures and mechanisms to avoid or prevent potential conflicts of interest. The Central Commission is made up of nine members, of whom three are appointed by the Government for a three-year term, with the possibility of re-election for only one additional term.

Mozambique has an inter-institutional task force, formed by the leading crime-fighting institutions, which focuses on organized crime.

The Financial Intelligence Unit was established in 2008. Its functions are to collect, centralize, analyse, and distribute information to the authorities in relation to financial and economic operations and to investigate cases of money-laundering and other crimes.

The law applicable to specialized authorities appears in sections 40-D of the Law on Procedures 14/2012, articles 1 and 2 of Law 14/2007 and articles 50-52 of the Probity Law.

Cooperation between national authorities is regulated in laws and inter-institutional agreements. In practice, although there are measures of cooperation between domestic agencies, a lack of communication was observed between the authorities responsible for the investigation and prosecution of crimes and public agencies.

Cooperation between national authorities and the private sector is regulated in article 40-H n1. (b) of the Law on the Office of Public Prosecutions (No. 14/2012). However, in practice structured cooperation between investigating institutions and the private sector was not observed.

Mozambique has taken measures to encourage citizens to report acts of corruption.

Persons who cooperate with justice may use toll-free telephone lines to report acts of corruption. Such cooperators will enjoy the same protection afforded to witnesses and reporting persons, in accordance with the provisions of article 32 of the Convention. Reduced sentencing in cases of cooperation is not regulated.

2.2. Successes and good practices

Achievements related to the implementation of chapter III of the Convention include the following:

- The efforts of the State to advance important legislative and institutional reforms to fight corruption.
- The creation of a Central Anti-Corruption Office in the corresponding office of the Attorney General's Office at the national level.
- The creation of toll-free telephone lines as a means of encouraging citizens to report acts of corruption.

2.3. Challenges in implementation

While taking note of the considerable efforts it has made to adapt its domestic legal system in accordance with the provisions of the Convention, Mozambique is advised to:

- Include in its future legislative reforms property, the element of benefit for third parties and the element of "offering" in the definitions of active and passive bribery, embezzlement and misappropriation (arts. 15 and 17).
- Proceed in the future to criminalize transnational active bribery (art. 16, para. 1).
- Consider the possibility of criminalizing transnational passive bribery (art. 16, para. 2).
- Consider including the statutory definition of abuse of functions, including the notion of abstention and the penalty (art. 19).

- Consider criminalizing active and passive bribery and embezzlement in the private sector in accordance with the Convention (arts. 21 and 22).
- Establish mechanisms of cooperation between the private and public sectors to expedite investigations of money-laundering (art. 23).
- Consider criminalizing concealment (art. 24).
- Proceed to criminalize obstruction of justice in accordance with the Convention (art. 25 (a) and (b)).
- Proceed to regulate effective sanctions in relation to the liability of legal entities, through penal and/or administrative statutes (art. 26).
- Consider clarifying in future legislative reforms whether the statute of limitations will be suspended during the proceedings to determine the immunity of a public official (art. 29).
- Adopt objective criteria in future legislative reforms on lifting immunity (art. 30, para. 1).
- Consider including in future legislative reforms to the Code of Criminal Procedures provisions on the organ responsible for the administration of confiscated assets (art. 31).
- Take the necessary measures to ensure seizure of the proceeds of crime and instrumentalities used in the commission of the corruption offences covered by the Convention (art. 31, para. 1).
- Consider the possibility of providing for a reduction in sentences for any criminal defendant who provides substantial cooperation in the investigation or prosecution of crimes of corruption (art. 37, para. 2).
- Take the necessary measures to improve existing cooperation between national authorities and cooperation between them and the private sector (arts. 38 and 39).
- Consider adopting legislation on criminal records (art. 41).
- Consider establishing specific legislation to apply extraterritorial jurisdiction in accordance with article 42 of the Convention.

2.4. Technical assistance needs identified to improve implementation of the Convention

Mozambique has expressed interest in receiving technical assistance in the following areas:

- Article 32: standard agreements and contracts, training programmes for the authorities responsible for the establishment and management of protection programmes for witnesses, experts and victims, and development of a plan of action for implementation.
- Article 36: summary of good practices and lessons learned.
- Article 41: drafting of legislative proposals and assistance in terms of the system for reporting crimes.

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)

Extradition is regulated in the Constitution, which establishes the basic principles (art. 67), the Extradition Act 17/2011 and treaties that Mozambique has ratified.

Extradition is subject to observance of the principle of dual criminality, but application of the principle remains flexible, as the analysis of criminal definition is conducted observing the elements constituting the offence and not its name.

Mozambique does not require a treaty, but instead can extradite on the basis of reciprocity. It cannot consider the Convention a legal basis for extradition in cases where it has not executed an extradition agreement with the requesting State.

Nationals may not be extradited by constitutional provision; in such cases the principle of *aut dedere aut judicare* applies (art. 56 of the Criminal Code). Also, the legal system does not provide for the possibility of executing a foreign criminal sentence.

Extraditable offences are those carrying a minimum penalty of one year, which applies to most corruption offences. If a ratified treaty establishes a minimum penalty for an extraditable offence, the latter would be applicable.

If the request for extradition contains several offences and any of them fall under any of the grounds of refusal established in the Constitution, Mozambique may deny extradition for such offences, but grant extradition for the others. Likewise, extradition may be granted for an offence which, alone, does not reach the threshold of severity, but taken jointly with other crimes, does satisfy that condition.

There is a general prohibition on extradition for political reasons (art. 67 of the Constitution). Offences covered by the Convention are not considered as political offences, but rather as economic in nature.

According to the information provided, requests for extradition are usually granted, unless they fall under the grounds of refusal established in domestic law.

Mozambique does not have a simplified extradition procedure or statistics that allow fulfilment of its obligation to expedite the proceedings to be analysed.

Before refusing an extradition request, Mozambique consults with the requesting State through diplomatic representations. The grounds of refusal are regulated in article 67 of the Constitution and article 4 of the Extradition Act.

Article 11, paragraph 2, of the Extradition Act seeks to guarantee the presence of the defendant at trial.

Mozambican justice guarantees equitable and non-discriminatory treatment for all criminal defendants, but such equitable treatment is based on customary law and not on a specific legal norm. The principle of non-discrimination is applied in Mozambican law, but it does not contain the element of political opinion (art. 4 of the Extradition Act).

There is no legal basis to prevent denial of a request for extradition for an offence that is considered to involve fiscal matters.

Mozambique has concluded several cooperation agreements on extradition matters.

As regards the transfer of sentenced persons, Mozambique has ratified the Convention on the Transfer of Sentenced Persons of the Community of Portuguese-speaking Countries and concluded agreements and protocols of understanding on such matters with Malawi and Zambia.

Mozambique does not have norms on the transfer of criminal proceedings, but applies the general principle of broad cooperation.

Mutual legal assistance (art. 46)

The basis of the procedure for providing and receiving mutual legal assistance in Mozambique derives from the Criminal Procedure Code and the Law on Money-laundering, treaties ratified at the bilateral and regional levels and reciprocity. Mozambique may use the Convention as the legal basis to provide such assistance.

Mozambique may expedite a wide variety of proceedings, including those relating to crimes in which a legal person may be held liable. However, asset recovery is not mentioned among the purposes for which mutual legal assistance may be requested.

Spontaneous transfer of information is not provided for in the law, nor has it occurred in practice. Transfer of Mozambican citizens for purposes of identification, to testify or provide assistance in obtaining evidence is also not provided for.

Bank secrecy does not prevent the execution of requests for legal assistance. Also, fiscal matters related to acts of corruption are not considered grounds for refusal of an assistance request, according to the information provided for by the authorities, even though the Law on Money-laundering (art. 49.3) states that the existence of fiscal matters is the sole ground for denial.

Dual criminality is not required, except in cases where treaties provide for it: for example, when the request refers to related coercive measures under the terms of the Law on Money-laundering, as amended.

The central authority is the Federal Attorney General. The Ministry of Justice is the authority charged with making the final decision on requests. The request must be processed through diplomatic channels and for more urgent cases, requests may be processed through the International Criminal Police Organization (INTERPOL). Oral requests are not accepted, even under urgent circumstances. English and Portuguese are the acceptable languages for submission.

There is no record of incoming or outgoing requests or statistics that make it possible to analyse whether Mozambique has responded favourably to requests for mutual legal assistance.

Mozambique applies its domestic law when responding to requests for mutual legal assistance that it receives. However, it seeks to resolve such requests favourably, unless they constitute a violation of its domestic law.

Article 13 of the Witness Protection Act No. 15/2012 permits the use of conference calls, but limits any kind of videoconference for reasons of recognition of the

witness in question. Conducting hearings with witnesses by videoconference is therefore not acceptable.

Mozambique does not have regulations on the principle of specialty or on confidentiality of requests, but applies them in practice.

A request for mutual legal assistance may be refused if it could affect the sovereignty, security, public order or essential interests of Mozambique, under the terms of the Law against Money-laundering, as amended.

Apparently, there have been no cases in which mutual legal assistance might have been postponed owing to a domestic investigation or an ongoing trial.

Enquiries prior to denying assistance are usually conducted by the central authority.

The cost of executing a request for assistance will be assumed by the requested State, unless the parties agree otherwise. Extraordinary expenses should be negotiated between the States. If the costs are low, Mozambique may cover them.

The authorities stated that Mozambique had signed the Protocol on Mutual Legal Assistance in Criminal Matters of the Southern African Development Community (SADC) and bilateral treaties.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

Mozambique lacks legislation on law enforcement cooperation; however, the amended Law on Money-laundering contains generic provisions on the need for cooperation with the competent authorities of other States. It is, however, limited to criminal proceedings concerning money-laundering and the financing of terrorism.

The authorities cooperate through organizations and networks such as INTERPOL, SADC, the Eastern and Southern Africa Money-Laundering Group, the Community of Portuguese-speaking Countries and others.

The Mozambican police cooperate with the police forces of other countries, directly or through INTERPOL, and with the border control forces of the six neighbouring countries.

To strengthen international cooperation, Mozambique has regulations which provide for the exchange of information for the detection and prosecution of offences. It has also signed several bilateral agreements, which provide for the exchange of information during an investigation and also the exchange of personnel to share good practices.

Mozambique lacks the capacity to fight corruption using modern technology.

Domestic law does not provide for the possibility of creating mixed investigative organs.

Mozambique lacks laws on the application and admissibility of special investigative techniques in cases of corruption, although several such techniques exist for crimes of drug trafficking.

3.2. Successes and good practices

Overall, the following points are regarded as successes and good practices in the framework of implementing chapter IV of the Convention:

- Mozambique can use the Convention as the legal basis for mutual legal assistance and international cooperation in matters of law enforcement (art. 46, para. 1, art. 48).
- Mozambique provides mutual legal assistance in the absence of dual criminality (art. 46, para. 9).
- The national authorities cooperate through organizations and networks such as INTERPOL, SADC, the Community of Portuguese-speaking Countries and others (art. 48).

3.3. Challenges in implementation

With a view to enhancing international cooperation, it is recommended that Mozambique:

- Note the advisability of continuing its efforts to establish and fully implement a computer system to systematically collect data on cases of international cooperation, as a means of expediting oversight of such cases and assessing their efficacy.
- Although it does not make extradition contingent upon the existence of a treaty, use the Convention as the legal basis for extradition.
- Permit extradition in the absence of dual criminality and include all corruption offences among extraditable crimes under the terms of the Convention (art. 44, para. 2).
- Examine the possibility of creating a simplified extradition procedure (art. 44, para. 9).
- Consider using a system for processing records which allows it to record the average duration of the extradition process (art. 44, para. 13).
- Examine the possibility of allowing offenders to serve the sentence imposed, or the remainder of their sentence, in accordance with the domestic law of the requesting State party, or establish a system that allows the execution of a foreign criminal sentence and the conditional transfer of nationals (art. 44, para. 13).
- Consider including political opinions in the legal norm that establishes the principle of non-discrimination (art. 44, para. 15).
- Consider preparing a bill on mutual legal assistance (art. 46).
- Expedite mutual legal assistance for purposes of asset recovery (art. 46, para. 3).
- Transfer information spontaneously (art. 46, para. 4).
- Consider the possibility of establishing a domestic procedure to expedite the transfer and receipt of detainees or convicted offenders (art. 46, paras. 10-12).

- Evaluate whether it would be possible and helpful to permit direct processing of requests from and to the central authority, and the possibility of accepting oral requests or requests submitted by mail (art. 46, para. 14).
- Consider the possibility of legislatively regulating the use of videoconferencing for purposes of mutual legal assistance (art. 46, para. 18).
- Include in its future legislative reforms a prohibition on denying mutual legal assistance for fiscal offences (art. 46, para. 22).
- Enact legislation or subscribe to agreements with other States that permit the transfer of criminal proceedings to another State party (art. 47).
- Consider developing legislation and executing bilateral or multilateral agreements on direct cooperation between law enforcement agencies and their counterparts, in particular to combat crimes committed using modern technology (art. 48).
- Make the legislative changes necessary to permit the creation of joint investigative teams (art. 49).
- Develop legislation and subscribe to bilateral or multilateral agreements or arrangements for the use of special investigative techniques in the context of international cooperation (art. 50).

3.4. Technical assistance needs identified to improve implementation of the Convention

- The Mozambican authorities have identified a need for assistance to support legislative changes in the legal framework of international cooperation in general and the fight against corruption in particular.
- The need for assistance to develop treaties on international cooperation in criminal matters was also mentioned.